STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RICKIE S. HICKS,

Defendant-Appellant.

UNPUBLISHED
March 20, 2003

No. 233434
Kent Circuit Court
LC No. 00-008542-FC

Before: Schuette, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317,[1] two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227(b). He appeals as of right. We affirm.

On the evening of May 29, 2000, Eric Williams and his brother, Jason Jones, walked to the home of Chris Hayes to obtain marijuana. Jones testified that they obtained a twenty-dollar baggie of marijuana and a ten-dollar baggie of marijuana. After leaving Hayes' home, Jones and Williams headed toward their family home on Dallas Street in Grand Rapids. As Williams and Jones were walking, they passed two men on bicycles. The men on the bicycles subsequently stopped. Williams ran back toward the men. Jones followed. A conversation took place about whether the men wanted to buy the marijuana that Jones and Williams had obtained at Hayes' home. Jones identified defendant and Joseph Ambrose as the two men on the bicycles. According to Jones, Ambrose took the baggies of marijuana and smelled them. Ambrose subsequently indicated that he wanted the marijuana. At that point, defendant pulled out a gun and grabbed Jones' shirt. Williams snatched Jones' shirt away from defendant and told defendant to "chill out." Williams then instructed Jones to run. Jones turned and ran. He heard a gunshot and heard Williams cry. Jones continued to run. When he looked back, he saw defendant and Ambrose riding away on the bicycles. Williams was on the ground. Williams died from a single gunshot wound to the center of his chest. The baggies of marijuana were not found at the scene. Jones testified that he did not see the actual shooting, but defendant was the only man Jones ever saw with a gun before the shooting.

[1] The second-degree murder charge was submitted to the jury as a lesser included offense of the charge of first-degree felony-murder.

At trial, defendant admitted that he and Ambrose were on bicycles on the day of the shooting. He also admitted that he and Ambrose spoke to Williams and Jones about purchasing marijuana. Defendant denied, however, that he had a gun, that he shot Williams, or that he robbed Williams and Jones of the marijuana. Defendant testified that after Ambrose smelled the marijuana, he indicated that he would buy it. Thereafter, Ambrose put the marijuana in his pocket and pulled out a gun. Williams pushed Jones out of the way and told Ambrose to "chill out, man." Ambrose stated, "Nigger, you know what time it is." Ambrose then shot Williams. Defendant admitted that he and Ambrose smoked the marijuana after the shooting. According to defendant, he informed his mother about the incident. She sent defendant to Indianapolis for "safety." Defendant's sister drove both Ambrose and defendant to Indiana. Defendant was apprehended by the Federal Bureau of Investigations in July 2000, at a hotel in Indianapolis.

Jennifer Brown, Ambrose's former girlfriend, testified that on May 29, 2000, before the shooting, she saw defendant and Ambrose at a barbecue. Defendant was playing with a child. When defendant tossed the child into the air, a gun fell out of the waist of defendant's pants and hit the ground. Defendant picked up the gun and put it back into his pants. Brown observed defendant and Ambrose leave the barbecue on bicycles.

I

Defendant first argues that the trial court improperly denied his *Batson* challenge during jury voir dire. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Defendant objected when the prosecutor used a peremptory challenge to excuse the only African American juror in the jury pool. On appeal, defendant argues that the trial court should have sustained his challenge because the prosecutor's alleged reasons for striking the juror were minor and vague. Defendant's argument has no merit.[2]

A *Batson* ruling is reviewed for an abuse of discretion. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997). Factual findings made by the trial court are given great deference because they turn in large part on credibility, and thus are reviewed for clear error. MCR 2.613(C); *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319-320; 553 NW2d 377 (1996). In *Batson*, the Court made clear that a prosecutor may not exercise peremptory challenges to strike jurors solely on the basis of their race. *Batson, supra* at 96. In deciding whether a defendant has made a prima facie case of discriminatory dismissal,

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[2] Defendant also asserts that his right to trial by an impartial jury under the Sixth Amendment of the United States Constitution, US Const, Am VI, and Article 1, Section 20 of the Michigan Constitution, Const 1963, Art 1, § 20, was violated. Defendant does not, however, explain his position. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . ." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, while a criminal defendant has the right to an impartial jury drawn from a fair cross-section of the community, *People v Hubbard*, 217 Mich App 459, 472; 552 NW2d 493 (1996), a defendant is not entitled to a petit jury that mirrors the community. *Id.* In this case, defendant has failed to make a prima facie showing of a violation of the Sixth Amendment of the United States Constitution or Article 1, Section 20 of the Michigan Constitution. See *People v Williams*, 241 Mich App 519, 525-526; 616 NW2d 710 (2000).

> the trial court must consider all relevant circumstances, including whether there is a pattern of strikes against black jurors, the questions and statements made by the prosecutor during voir dire and in exercising his challenges, all of which may support or refute an inference of discriminatory purpose. [*People v Barker*, 179 Mich App 702, 705-706; 446 NW2d 549 (1989) (citation omitted).]

In other words, defendant not only bears the burden of showing that the juror belonged to a recognized racial group and that a peremptory challenge was used to excuse the juror, but he must also must show that the facts and other relevant circumstances raise an inference that the prosecutor used a peremptory challenge to exclude the juror based on race. *Batson, supra* at 96.

> [T]he race of a challenged juror alone is not enough to make out a prima facie case of discrimination. The mere fact that a party uses one or more peremptory challenges in an attempt to excuse minority members from the jury venire . . . is not enough to establish a prima facie showing of discrimination. [*Clarke v Kmart Corp (After Remand)*, 220 Mich App 381, 383; 559 NW2d 377 (1996), citing *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989).]

If there is no prima facie showing of purposeful discrimination, a prosecutor is not required to offer a neutral explanation for the use of the peremptory challenge. *Williams, supra* at 137*; Barker, supra* at 706. If a prima facie showing has been made, however, "the prosecution must provide a racially neutral explanation for peremptorily excluding racial minorities from the venire, and the trial court must decide if the defendant proved purposeful discrimination." *People v Ho*, 231 Mich App 178, 184; 585 NW2d 357 (1998).

In the instant case, defendant failed to demonstrate facts or circumstances to support the inference that the juror was excused because of her race. Because the juror was apparently the only African American in the jury pool, no pattern of discriminatory strikes was evident prior to her dismissal. The prosecutor's questions and statements during voir dire also did not support an inference of discriminatory purpose. Defendant made no showing of purposeful discrimination by the prosecutor, but objected merely because of the race of the juror who was removed. This is insufficient. *Clarke, supra.* On that basis alone, we find that the trial court did not abuse its discretion in denying defendant's *Batson* challenge.

We also note, however, that the prosecutor offered valid, race neutral reasons for removing the juror. The prosecutor stated that the juror was excused because of her failure to disclose during voir dire that a bench warrant had been previously issued against her for failure to pay parking tickets. We disagree with defendant's contention that this information was not a sufficiently specific, racially neutral explanation for striking the juror. The trial court did not abuse its discretion in overruling the *Batson* challenge.

II

Defendant next argues that the trial court erred by its response to the following question, which was posed by the jury during deliberation: "If he [defendant] only pulled out a gun but did not shoot Eric, is he still guilty of second degree murder?" The trial court responded:

> That depends on how you evaluate facts. He could be or he might not be. If he pulled out the gun, if you conclude he did that, and if you conclude that he did this for the purpose of aiding in an armed robbery, that is, aiding Mr. Ambrose in taking the marijuana away from Mr. Jones and Mr. Williams, then he's aiding and abetting in an armed robbery.
>
> If he knows that this is the purpose. That this is what is going on. This is what Mr. Ambrose is going to do, he is going to take this marijuana away without paying for it. And if you also conclude that when he hauled out the gun and showed it to Mr. Williams and Mr. Jones, if that is what he did, and he knowingly created a high risk of death or great bodily harm when he did that, knowing that death or such harm would be the likely result, you could conclude that he aided and abetted in a felony murder, or if in your judgment it shouldn't be that, you could conclude that he aided and abetted in a second degree murder. That's for you to decide. Not me, the attorneys, you. That lies solely in your discretion.

Defendant objected to the instruction, arguing that the trial court should not have given examples to the jury and should only have instructed that the elements of second-degree murder must be satisfied in order to convict. On appeal, defendant argues that the trial court's instruction improperly focused on theories of guilt and that it interfered with the jury's role as the finder of fact. We disagree.

Claims of instructional error are reviewed de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). The instructions are reviewed as a whole to determine if the trial court made an error requiring reversal. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001), lv gtd in part on other gds 466 Mich 889 (2002). Even if the instructions are not perfect, error is not created if the instructions fairly presented the issues for trial and adequately protected the defendant's rights. *Id.*

The trial court's supplemental instruction fairly presented the issues to be tried and sufficiently protected defendant's rights. *Katt, supra.* The trial court noted that whether the defendant was guilty depended on the jury's evaluation of the facts. The trial court did not espouse a particular point of view nor did it interfere with the jury's independent judgment or role as the finder of fact. Further, the initial jury instructions made clear that the elements of the offense had to be proven beyond a reasonable doubt. Considering the instructions as a whole, we find no error. In deciding this issue, we note that defendant cites no applicable authority to support his claim that the trial court's use of examples in the supplemental instruction was inappropriate. "A party may not leave it to this Court to search for authority to sustain or reject its position." *People v Fowler*, 193 Mich App 358, 361; 483 NW2d 626 (1992).

III

Defendant additionally argues that the trial court improperly permitted Jones to make an in-court identification of Ambrose, who was unavailable as a witness because he asserted his Fifth Amendment right to silence. Ambrose was brought into the courtroom for the sole purpose of allowing Jones to identify him as the man who was with defendant when the victim was shot. Defendant argues that the in-court identification was highly prejudicial and should have been precluded under MRE 403. We review this unpreserved allegation of error for plain error.

People v Carines, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture of an issue under the plain error rule, a defendant must demonstrate the existence of a plain error that affected his substantial rights, i.e., affected the outcome of the lower court proceedings. *Id.* at 763-764.

Defendant's argument on this issue is without merit. First, contrary to defendant's argument, there was no identifiable prejudice relating to the in-court identification. It was undisputed that defendant was with Ambrose at the time of the shooting. Defendant admitted this to the jury, and his theory of the case was that Ambrose was the shooter. Under the circumstances, Jones' identification of Ambrose was not unfairly prejudicial and did not confuse or mislead the jury. MRE 403. Second, defendant's counsel not only failed to object to the in-court identification, but he appeared to welcome the in-court identification.[3] During defendant's direct examination, defense counsel asked about the in-court identification. In closing argument, defense counsel reminded the jury that it saw Ambrose during trial. Counsel argued that Ambrose's appearance was not similar to the description originally given by Jones. Counsel used the discrepancies between Ambrose's appearance and Jones' original description to argue that Jones was not credible. A defendant is not allowed to assign error on appeal to something his own counsel deemed proper at trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). "To do so would allow a defendant to harbor error as an appellate parachute." *Id.* We therefore find no plain error requiring reversal. *Carines, supra.*

IV

Defendant next challenges the prosecutor's introduction of testimony that a .38 caliber weapon was found in the hotel room where he was arrested. Defendant argues that the existence of the weapon was irrelevant, was introduced only to impute bad character to him, and was prejudicial. We review this unpreserved allegation of evidentiary error for plain error. *Carines, supra.*

It was undisputed that the bullet removed from the victim was a .32 caliber bullet. Expert testimony established that the bullet could not have been fired from any .38 caliber weapon. In addition, no fingerprints were found on the .38 caliber weapon and defendant denied any knowledge of the weapon. Under the circumstances, we agree with defendant that the existence or recovery of the .38 caliber weapon was irrelevant to any fact at issue at trial. MRE 401. We disagree, however, that the admission of the evidence requires reversal. *Carines, supra.* Defendant has not demonstrated that the evidence affected the outcome of the trial. *Id.* He simply opines that the evidence could have been used to impute bad character to him. Considering that defendant denied any knowledge of the weapon, that Ambrose went to Indianapolis with defendant, that there was no evidence to support or suggest that defendant was the only occupant of the hotel room, and that defendant's fingerprints were not found on the

[3] Defendant wanted the jury informed that Ambrose was unavailable because he was exercising his right to remain silent. Defendant's request for such an instruction was made in advance of the in-court identification. Ultimately, the trial court declined to inform the jury that Ambrose had asserted his Fifth Amendment right to remain silent. When the jury asked why Ambrose did not testify, the trial court informed the jury, without objection, that Ambrose was legally unavailable and could not be called by either the prosecution or the defense.

weapon, we are not persuaded that the evidence prejudiced the outcome of trial. Moreover, even if such prejudiced existed, reversal is not required unless the error resulted in the conviction of an actually innocent defendant or the error seriously affected the fairness, integrity, or public reputation of the proceeding. *Carines, supra.* Neither criteria is met in this case.

V

Defendant next challenges a portion of the prosecutor's closing argument. Specifically, defendant complains that the prosecutor improperly invoked sympathy for the victim by arguing facts that were not in evidence. At trial, defendant objected to the challenged argument on the ground that it was based on facts that were not in evidence. We review the preserved issue by examining the prosecutor's remarks in context to determine if defendant was denied a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Defendant never objected to the argument on the ground that it was an improper appeal to the jurors' sympathies. "An objection based on one ground at trial is insufficient to preserve an appellate attack on a different ground." *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Thus, the issue whether the prosecutor improperly appealed to jury sympathy is unpreserved and is reviewed for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). There is no error if a timely instruction could have cured the prejudicial effect of the improper comments. *Id.*

The prosecutor argued:

> This environment, this courtroom, is really kind of an artificial sterile environment. I mean, people come in and they describe or tell you what they saw and tell you what happened, but I submit to you, it isn't the real thing. I can't get across enough, I don't think, that, in fact, we have someone who is dead here. Eric Williams is dead. He took a bullet in the center of his chest as a result of conduct and action by the Defendant, the Defendant.
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> I can't impress that upon you enough. In this sterile environment that somehow and sometimes gets lost because you hear witnesses come in and there is arguing going back and forth. Make no mistake about it. *We had a person who, as his mother indicated, was a living person, who had children, who had a life, who was supporting a family.* [Emphasis added.]

Prosecutors may not make statements that are unsupported by the evidence or reasonable inferences drawn from the evidence. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). The argument at issue, however, was based on facts in evidence. The victim's mother testified that she saw the victim alive on the day of the shooting and that the victim was very responsible and had a family of his own. Under the circumstances, defendant's argument has no merit.[4]

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[4] Within his argument on appeal, defendant states that the "sympathy evoking" facts were inadmissible. Any issue with respect to the admissibility of the testimony at issue is abandoned as it was not raised in the statement of questions presented. *People v Miller*, 238 Mich App 168,
(continued…)

We also reject defendant's argument that the prosecutor's appeal to jury sympathy requires reversal. Appeals to the sympathy of the jury constitute improper argument, *Watson, supra* at 591, and the challenged comments in this case clearly appealed to the jurors' sympathies. Nevertheless, the comments were isolated and did not prevail throughout the closing argument. Moreover, the comments were not inflammatory. A timely curative instruction would have cured any prejudice. *Id.* Furthermore, we note that the trial court instructed the jury that it must not let sympathy or prejudice influence its decision. The trial court also instructed the jury that the lawyers' statements and arguments were not evidence. Therefore, reversal is not required. *Id.* at 586.

VI

Finally, defendant argues that the cumulative effect of the errors denied him his right to a fair trial and due process. This argument fails. Since any errors during the trial were not of consequence, there was no cumulative error that denied defendant a fair trial. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Miller (After Remand)*, 211 Mich App 30, 43-44; 535 NW2d 518 (1995).

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Kurtis T. Wilder

(…continued)

172; 604 NW2d 781 (1999).